Gregor A. Hensrude, Bar No. 226660
Daniel S. Agle, Bar No. 251090
KLINEDINST PC
501 West Broadway, Suite 600
San Diego, California 92101
(619) 239-8131/FAX (619) 238-8707
dagle@klinedinstlaw.com

Attorneys for Defendant
RAAD KHALAF

KLINEDINST PC
501 WEST BROADWAY, STE. 600
SAN DIEGO, CALIFORNIA 92101

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ASIA AWAD, Plaintiff, v. LIBERTY MUTUAL FIRE INSURANCE COMPANY, RAAD KHALAF and DOES 1-30, inclusive,, Defendant.	Case No. 08-CV-00696-JM-AJB **REPLY TO PLAINTIFF'S OPPOSITION TO DEFENDANT RAAD KHALAF'S MOTION TO DISMISS** Date: June 6, 2008 Time: 1:30 p.m. Courtroom: 16 Judge: Judge Jeffrey T. Miller Magistrate Judge: Complaint Filed: 4/16/08 Trial Date: None set

Plaintiff Asia Awad ("AWAD") has failed to state a claim against Defendant Raad Khalaf ("KHALAF") because she has pled no facts that could establish an enforceable duty under dual agency or under the special duty exception. AWAD has not pled that KHALAF was acting as her sole agent and she has not pled that KHALAF was acting as a dual agent. Therefore, pursuant to *Good v. Prudential Ins. Co. of Am.*, 5 F.Supp.2d 804 (N.D. Cal. 1998), her claims against KHALAF are untenable and should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6).

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KLINEDINST PC
501 WEST BROADWAY, STE. 600
SAN DIEGO, CALIFORNIA 92101

I.

AWAD HAS NOT PLEAD FACTS SUFFICIENT TO ESTABLISH THAT KHALAF OWED HER A DUTY AS HER AGENT

It is axiomatic that a plaintiff is bound by the allegations included in her complaint and AWAD has clearly alleged that KHALAF was an agent and employee of Liberty Mutual Fire Insurance Company ("LMFIC") and that KHALAF was acting within the scope of that agency and employment "at all times." (Complaint at ¶ 2) Moreover, this allegation of the complaint was specifically incorporated into the sole cause of action alleged against KHALAF. (Complaint at ¶ 15) Here, AWAD's own allegations are sufficient for the purposes of this motion to establish that KHALAF was an agent and employee of LMFIC. This allegation is identical to the circumstances found in *Good*. See *Good v. Prudential*, 5 F.Supp.2d. at 808 (citing complaint). Further, the declarations page of the contract attached to AWAD's complaint clearly shows that KHALAF was an agent of LMFIC.

It is disingenuous for AWAD to now claim that there is no evidence that KHALAF was acting as an agent and employee of LMFIC when her own allegations confirm that he was. And, consequently, AWAD cannot possibly establish that KHALAF was acting as her sole agent as any such attempt would be entirely contradictory to the allegations of her complaint.[1]

Significantly, AWAD's opposition admits that *Good* is controlling on the issue of dual agency. *Good* held that an insurance agent cannot be a dual agent unless he is an independent broker or has a long-term relationship with the insured. *Id.* at 808. Because AWAD alleged that KHALAF is an employee and agent of LMFIC, she cannot contradict that allegation and argue that KHALAF is an independent broker. Further, the complaint does not present any allegations establishing a long-term relationship between

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[1] Not only is AWAD's "sole agent" argument contradictory to paragraph 2 of the complaint, but she also fails to allege any facts supporting the argument and relies solely on conclusory allegations.

KLINEDINST PC
501 WEST BROADWAY, STE. 600
SAN DIEGO, CALIFORNIA 92101

AWAD and KHALAF. AWAD has not alleged dual agency in this case, nor has she explained in her opposition how she could, therefore, KHALAF should be dismissed.

II.

AWAD HAS NOT PLED ANY FACTS TO SUPPORT THE APPLICATION OF THE SPECIAL DUTY EXCEPTION

The factual allegations of AWAD's complaint could not possibly lead to the "special duty" exception she cites. In *Quiroz v. Valley Forge Insurance* 2005 U.S. Dist. LEXIS 43316 (N.D. Cal.), the court found that there are three circumstances where a special duty could arise: (1) where the agent misrepresents the nature, extent or scope of the coverage being offered; (2) where the agent assumes an additional duty by express agreement or by holding himself out as having expertise in a specific field; or (3) where the insured requests a specific type or extent of coverage and the agent fails to procure that coverage. *Id.* at *20.

In this case, AWAD has not alleged that (1) KHALAF made misrepresentations to AWAD regarding the nature, extent or scope; (2) that KHALAF expressly agreed to assume and additional duty or held himself out as an expert; or (3) that KHALAF failed to procure the type and extent of insurance AWAD requested. In fact, AWAD alleges in her complaint that LMFIC issued a policy for exactly the type and extent of coverage she was seeking. Further, AWAD filed this lawsuit to enforce the coverage that KHALAF obtained for her and not because KHALAF failed to obtain the coverage. AWAD's failure to articulate in her opposition how the special duty exception could possibly apply to this case further illustrates its inapplicability. In the absence of any factual allegations that could possibly lead to the application of the special duty exception, that exception does not apply here.

III.

CONCLUSION

There are absolutely no factual allegations that support any finding that KHALAF was acting as the sole agent of AWAD or that KHALAF was acting as a dual agent for

KLINEDINST PC
501 WEST BROADWAY, STE. 600
SAN DIEGO, CALIFORNIA 92101

both LMFIC and AWAD. AWAD's unsupported, conclusory allegations that KHALAF was her agent are insufficient to establish an agency relationship. Further, the factual allegations of the complaint do not lead to the application of the special duty exception. Not only does the complaint fail to allege sufficient facts, but AWAD fails to provide any analysis in her opposition showing how the alleged facts lead to the application of dual agency or special duty. Because there is no basis for an enforceable duty, there is no possible way that AWAD could state a cause of action against KHALAF and this case should be dismissed for failure to state a claim upon which relief can be granted.

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DATED: May 29, 2008

By: / S / Daniel S. Agle
DANIEL S. AGLE
Attorneys for Defendant
RAAD KHALAF

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